

FACT SHEET

APRIL 1998

Implementation Procedures for Executive Order 13007: "Indian Sacred Sites"

Introduction

Executive Order 13007, "Indian Sacred Sites," was issued by President Clinton on May 24, 1996. The general purpose of the (EO) is to ensure that Federal agencies are as responsive as possible to the concerns of American Indian tribes regarding sacred sites. Specifically, it addresses access to sacred sites by Indian tribal religious practitioners and the physical protection of such sites.

EO 13007 requires five actions of Federal agencies:

1. Accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, as long as such accommodation is not inconsistent with the law or with essential agency functions.
2. Avoid adverse effect on the physical integrity of such sacred sites, subject to the same caveats.
3. Maintain information on such sites in confidence where appropriate.
4. Implement procedures to carry out the provisions of the order, including providing notice to Indian tribes of actions potentially affecting sacred sites or access to them, in a manner that respects the sovereignty of Indian tribal governments.
5. Report to the President about any changes needed in law, regulation, or procedure to accommodate access to and ceremonial use of Indian sacred sites, to avoid adverse effect on such sites, and to facilitate consultation with tribes and religious leaders, including provision for the resolution of disputes.

The following is a series of answers to questions that are likely to arise in the course of managing GSA real property. The answers are designed to help GSA Regional Offices comply with EO 13007.

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Definitions

Federal Lands

The EO defines *Federal lands* as "any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands." For the purposes of GSA, this definition appears to include all real property administered by GSA, including the sites of Federal buildings and other Federal facilities, all real property leased by GSA, and all real property administered by GSA for purposes of disposition. The EO does not define *Indian lands*, but the Indian Self-Determination and Education Act (PL 93-638) and other statutes define these lands as all lands within the external boundaries of Indian reservations.

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Indian Tribe

The EO defines *Indian tribe* as "an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454." It defines *Indian* as a member of such an Indian tribe.

The Bureau of Indian Affairs publishes a list of Federally recognized tribes each year in the Federal Register. The Cultural, Environmental and Accessibility Programs Division (PXSC) of National Office makes this list available through NEPA Call-In.

As noted below, because of other laws and regulations requiring consultation with a broader range of tribal and semi-tribal entities, there may be tribes other than those included in this list with which GSA should consult about sacred site issues, though they are the only ones with which consultation is required under the EO.

Sacred Site

The EO defines *sacred site* as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site."

Questions and Answers

Q: What are some examples of sacred sites?

A: Examples include:

- Places that figure in a tribe's traditions about its origins and interactions with the supernatural. Such areas are often unusual parts of the natural environment, such as lakes, mountains, waterfalls, springs, and rivers. They may include human constructions such as "medicine wheels" and stones, or cairns, marking vision locations, but they may also be entirely natural.
- Places where religious rituals are customarily carried out, such as sun dance sites, the sites of sweat lodges, and vision quest sites.

- Sites representing ancestral living places or cemeteries, often thought of as archeological sites.

Q: What does the Executive Order mean when it says that a sacred site must be a "specific, discrete, narrowly delineated location ... that is identified by an Indian tribe or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site?"

A: *Specific* means that the site must be a definite piece of real property rather than a whole class of properties. In other words, it must be "the Sunrise ceremony site on Mount Montana," not "sacred sites in the State of Colorado" or "all sunrise ceremony sites."

Discrete means that the site must be definable in terms of geography. It must be "Wild Horse Canyon as shown on U.S. Geological Survey Quadrangle ABC," not "the place where spirit horse rituals are carried out."

Narrowly delineated location means that the site can be assigned boundaries based on reasonably reliable evidence and/or inference. Many (though not all) Indian sacred sites are eligible for inclusion in the National Register of Historic Places, so National Register guidance on boundary determinations should be followed in establishing sacred site boundaries. Pertinent guidance is found in National Register Bulletins 15 and 38, which can be obtained from NEPA Call-In. Note, however, that a site may be sacred to a tribe and must be considered under the Executive Order, even if it is not eligible for the National Register.

Identified by an Indian tribe, or Indian individual does not mean that a tribe must provide GSA with a list of all its sacred sites to have them considered in GSA's planning. Under several other authorities, notably the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), it is GSA's responsibility to determine the character of the environment potentially affected by its actions, including its management of Federal lands. Although such determinations often include checking existing lists (endangered and threatened species lists maintained by the Fish and Wildlife Service, the National Register of Historic Places, etc.), the statutes and

their implementing regulations routinely indicate that this is not enough. In many cases, GSA must also carry out its own studies to define the character of the affected environment. Sacred sites and their uses are aspects of the environment that may be affected by GSA actions. It would be misleading, and cause potential conflicts with NEPA, NHPA, and other authorities (e.g., the American Indian Religious Freedom Act and EO 12898) for GSA to consider the effects of its actions only on pre-identified sacred sites. Thus the phrase, *identified by an Indian tribe, or Indian individual* should be understood to mean both "identified on a general list provided to GSA by a tribe" and "identified by GSA through consultation with Indian tribes and individuals in the course of planning or property management."

Appropriately authoritative generally means "identified by the tribal government as authoritative." As discussed below, an early step in identifying sacred sites is government-to-government consultation with the pertinent tribal government(s). In the course of such consultations, a tribal government may identify a particular person, persons, or group as the authoritative party or parties with which GSA should consult about sacred sites and related resources and values (e.g., historic properties, Native American cultural items, religious practices, traditional subsistence activities). Such parties, and parties that they may identify, can be regarded as *appropriately authoritative*. For example, the tribal government might identify a "cultural committee" or "cultural resource coordinator" as the point of contact for GSA. This party might subsequently identify specific elders or spiritual societies who should be consulted. Both the individual or group identified by the tribal government, and those identified by that individual or group, can be considered *appropriately authoritative*.

In some cases, an *appropriately authoritative* person may be a person not identified directly or indirectly by a tribal government. In some cases on non-Indian land, a tribal government may decline to be involved in GSA planning and management because it perceives itself to have no role in management outside the reservation. In other cases there may be conflicts between a tribal government and such authoritative parties as religious leaders. Although the tribal government is the key decisionmaker on Indian land, and must be given considerable deference on Federal land, GSA may not disregard the interests of concerned individuals and groups simply because they are not

officially sanctioned by the tribal government. In such cases, GSA may need to ascertain an individual's degree of authority through a review of the individual's credentials and consultation with other knowledgeable parties.

Q: *In what ways might GSA impede access and ceremonial use?*

A: If we destroy a sacred site when building a Federal facility we clearly impede access to and use of it. This kind of obvious impact isn't the only way we may impede access and use, however. We may do so in a number of other ways, for example, by:

- Transferring Federal property containing a sacred site to a non-federal party who will deny access and use, or who may destroy the site(s).
- Constructing facilities that diminish the visual, auditory, atmospheric, or aquatic qualities of a site or its surroundings that are necessary for its ceremonial use.
- Constructing facilities, or permitting land uses, that make access to the site difficult or impossible, for example by blocking trails or roads to the site.
- Altering the natural environment in ways that adversely affect access and use, for example, by destroying or toxifying medicinal plants during a program of spraying for insect control.

Q: *How can GSA accommodate access and ceremonial use?*

A: On GSA-controlled lands or in planning GSA projects, we can accommodate access and ceremonial use of sacred sites by ensuring identification of sacred sites, and tribal access and use concerns, during planning. Such sites and concerns should be addressed during compliance with NEPA, NHPA, EO 12898, and other authorities.

We can accommodate access and ceremonial use in connection with ongoing management of Federal facilities by consulting with tribes and authoritative individuals to determine their concerns, and by adjusting management practices to accommodate such concerns to the extent feasible.

Executive Order 13007

of May 24, 1996

Protection and Accommodation of Access to Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites.

(a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

- (i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;
- (ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

- (iii) "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Section 2. Procedures.

- (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."
- (b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian

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sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Section 3.

Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Section 4.

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

(Signed) *President Clinton*

THE WHITE HOUSE
May 24, 1996

Q: How should GSA conduct "government-to-government relations" with tribes?

A: Indian tribes are sovereign "nations within a nation," and their governments must be accorded the respect due a sovereign state. This characteristic places tribes in a different category from State and local governments, and the way we treat them must reflect this difference. Under several authorities, most recently the Presidential Memorandum of April 29, 1994, regarding government-to-government relations, Federal agencies are directed to operate within a government-to-government relationship with Indian tribes.

In practical terms, this means that we must deal at an official, executive level with tribal governments. Official relations with tribal governments must be carried out by GSA line officials, usually the Regional Administrator or Assistant Regional Administrator, who are in effect the representatives of the President. Technical staff and contractors should never be tasked to carry out formal, official contact with tribal governments. Staff-level contact with a tribal government is not a substitute for executive-level consultation, though it often occurs on a routine basis once government-to-government relations have been established, and it may occur in preparation for a government-to-government consultation.

Q: How can you comply with EO 13007 in planning GSA actions?

A: Preservation of sacred sites, access to such sites, and ceremonial use of such sites should be addressed in the course of project planning and review under NEPA, NHPA, EO 12898, the Native American Graves Protection and Repatriation Act (NAGPRA) and other authorities.

■ **NEPA:** Potential impacts on access to or use of Indian sacred sites, and on the sites themselves, should be considered in determining whether a project can be categorically excluded from further NEPA review. Such impacts will often, if not always, constitute "extraordinary circumstances" (see Title 40 CFR Part 1508.4)

and make it inappropriate to treat the subject action as categorically excluded.

During formal scoping for an Environmental Impact Statement (EIS) and during informal scoping for an Environmental Assessment (EA) under NEPA, appropriate efforts should be made to determine whether there are sacred site issues to be addressed. Indian tribes and people familiar with Indian tribal concerns should be consulted early in the scoping process. Since information on sacred sites and their uses is often very sensitive, consultation with tribes should usually begin before public scoping meetings are held.

Sacred sites, access to such sites, and ceremonial use of such sites should be considered part of the affected human environment in EAs and EISs. The significance of impacts on sacred sites should be considered in EAs in determining whether an action is a major Federal action significantly affecting the quality of the human environment.

Tribes and appropriately authoritative individuals should be consulted during EA and EIS studies. Draft EISs, and EAs where circulated in draft, should be provided to tribes and appropriately authoritative individuals for comment.

To the extent consistent with the purpose and need for the project, the alternative selected after NEPA review should be one that accommodates access to and ceremonial use of any Indian sacred sites that may be affected. Care must be taken, however, with thorough legal counsel, to avoid an action that could be construed to support the practice of Indian religion in violation of the Establishment Clause of the First Amendment to the Constitution.

Measures providing for access and use, and measures to avoid or reduce the severity of adverse effects, should be included as mitigation measures identified in the EIS and Record of Decision (ROD), or in the EA and Finding of No Significant Impact (FONSI).

- **EO 12898:** Potential impacts on sacred sites and on access or use of such sites by Indian tribes should be evaluated as potential "high and disproportionate adverse environmental

impacts" under EO 12898 and the Presidential Memorandum regarding its application in the NEPA process.

- **NHPA SECTION 106:** During the assessment of information needs that begins the process of review under Section 106 of NHPA, one factor that should be assessed based on background research and consultation is whether there may be sacred site qualities to historic properties within the action's area of potential effects.

Identification of sacred sites and identification of concerns about access and use should be coordinated with the identification of historic properties.

Concerned tribes should be consulted during identification of historic properties, determinations of effect, and consultation to resolve adverse effects.

Where sacred sites are eligible for inclusion in the National Register of Historic Places, access to and use of such sites, and avoiding or reducing the severity of adverse effects to their physical integrity, should be included in Memoranda of Agreement and Programmatic Agreements executed under Section 106 and its implementing regulations (Title 36 CFR Part 800).

- **NAGPRA:** Contacts and consultation with tribes under the EO should be coordinated with the contact and consultation required by 43 CFR 10, the regulations implementing NAGPRA.

Q: *How can you comply with EO 13007 in ongoing property management?*

A: In most cases, EO 13007 is an issue for GSA management of large rural sites such as surplus military installations. There are exceptions to this rule, however, for example: where an Indian tribe's ancestral cemetery may lie within the grounds of a Federal building.

Property managers should consult with the tribe(s) to determine whether any sacred site issues exist with respect to property under GSA control. If such issues do exist, property managers should manage the property, to the extent feasible, in ways that do not impede access and ceremonial use, and in a manner that avoids adverse effect on the physical integrity of sacred site(s).

Implementation of the EO should be coordinated with ongoing management of historic properties under NHPA Section 110.

Disposal of Federally owned property, leases, management agreements, and similar activities that permit use of Federal real property by non-federal parties, are GSA actions that should be treated in accordance with NEPA, EO 12898, NHPA, and NAGPRA (see above).

In managing land containing sacred sites, it is very important not to take management actions that would "establish" religion in conflict with the Establishment Clause of the First Amendment to the Constitution. Generally speaking:

- Setting aside Federal property for the exclusive use of religious practitioners may be taken to establish religion, and hence unconstitutional. Tribal requests for exclusive use rights must be reviewed carefully with legal counsel.
- Requiring anyone to respect or participate in a religious activity may be taken to establish religion. Encouraging people to avoid impeding or disrupting such an activity, and regulating activities that clearly impinge upon the rights of others to conduct a religious event, is unlikely to be interpreted as establishment.

Q: *How should the interests of non-federally recognized tribes, Native Hawaiian groups, and other aboriginal groups be addressed?*

A: Non-federally recognized tribes, Native Hawaiian groups, and other aboriginal groups have no rights under EO 13007, but they are concerned members of the American public with rights under NEPA, NHPA, EO 12898, and other legal authorities. There is no requirement for government-to-government relations with such tribes and groups; however, such tribes and groups should be treated with respect, in essentially the same way one treats a Federally recognized tribe.

Q: *How does the definition of "sacred site" in EO 13007 affect the definition of "historic property" under the National Historic Preservation Act?*

A: Not at all. For example:

A sacred site may or may not be eligible for the National Register. For instance, a site to which a

sacred character has been ascribed for less than fifty years will probably not be eligible for the National Register, but may nevertheless be a sacred site that must be considered under the EO.

National Register procedures should be used for establishing the boundaries of a sacred site, but it is possible that the boundaries of a National Register-eligible site may be larger or smaller than those of an EO 13007 site.

National Register-eligible properties may be identified using a wider range of methods than the EO prescribes. The EO emphasizes consultation with Indian tribes and authoritative individuals to give them the opportunity to identify sacred sites, while determining National Register eligibility often involves historical, anthropological, and archeological research as well.

Q: *How can we protect the confidentiality of information about sacred sites?*

A: When a sacred site is eligible for the National Register, Section 304 of NHPA can be invoked. Under this authority, information on the site and its uses can be maintained in a confidential form if releasing such information could cause an invasion of privacy, risk harm to the site, or impede its use by religious practitioners. The Keeper of the National Register must be consulted in applying Section 304. If the significance of the site has an archeological element, and release of information could lead to its damage or destruction, Section 9 of the Archeological Resources Protection Act (ARPA) allows information to be kept confidential without consulting the Keeper.

Sometimes it is feasible to protect the physical integrity of, and access to, sacred sites without ever requiring that they be documented. For example, in siting buildings on a Federal facility site, it might be possible to consult with a tribe and its religious leaders about where to put buildings, roads, and landscape features so as to avoid adverse effects and impeding access without inquiring into the exact location and character of sacred sites. The project could then be designed in response to the tribe's concerns, without ever having to generate documentation about such sites.

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Q: How should we consult with tribes?

A: National Register Bulletin 38 should be consulted for some of the issues surrounding sacred sites consultation. Here are some general guidelines:

Try to establish general, ongoing working relationships with tribes in the region. These relationships should be initiated in a government-to-government manner (*see above*), but then may be carried forward at a staff level if the tribes agree. Establish tribal points of contact for consultation on specific issues and projects, and establish how consultation should be carried out.

Initiate consultation on specific land-use or construction projects very early in planning. Recognize that some sacred site issues may not be appropriate for discussion in public; hence tribal consultation should occur before consultation occurs with the general public.

Carry out consultation in a manner that recognizes tribal cultural values. Learn what these values are, and how they may influence interaction with the tribe.

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